

**STATE OF WISCONSIN
DEPARTMENT OF COMMERCE**

In the Matter of the PECFA Appeal of

Karen A. Sainsbury
K & S Automotive
2977 Janke Road
Madison, WI 53703

PECFA Claim #53527-9502-51
Hearing #98-21

**DISMISSAL DECISION
UNTIMELY APPEAL**

The appeal in this matter was filed with the Department of Commerce on February 24, 1998, the date it was received. The department's decision that is the subject of the appeal is dated January 23, 1998. The appeal in this matter was filed 32 days after the department's decision. The appeal provisions of §ILHR 47.53, Wis. Adm. Code, specify that "[a]ll appeals pursuant to this chapter shall be filed no later than 30 calendar days from the date of the decision being appealed." This time limit is set out in a notice of appeal rights attached to the department's decision and sent to the appellant.

Because the appeal in this matter was not filed within the time limit required by the administrative rule, said appeal is hereby dismissed.

This is a final decision of the Department of Commerce. You may request a rehearing pursuant to §227.49, Stats., within 20 days of the date of this decision, by sending your petition to Dennis Kozich, Chief Counsel, Department of Commerce, P O Box 7970, Madison, Wisconsin 53707-7970. This decision may be appealed within 30 days of the date of this decision or the date of a decision on a request for rehearing, if any, pursuant to §227.53, Stats. The parties in interest are the Secretary, Department of Commerce, 201 West Washington Avenue, 6th Floor, P O Box 7970, Madison, Wisconsin 53707-7970 and the appellant named in the appeal caption above.

Dated and Mailed: February 8, 1999

James H. Moe
State Hearing Examiner
Department of Commerce

Copies to:

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RULING ON MOTION TO DISMISS APPEAL

On January 23, 1998, the Department of Commerce issued a decision that allowed PECFA reimbursement of costs in the amount of \$84,123.33, but found that costs in the amount of \$4,279.25 were not eligible for reimbursement. On Thursday, February 19, 1998, the appellant's agent mailed a certified letter to the department appealing the decision and requesting a hearing. On Tuesday, February 24, 1998, the department received the appellant's letter. The department then moved to dismiss the appeal on the grounds that it was not timely filed.

The issue to be resolved is whether the appellant's request for review should be dismissed because the appeal was not filed within 30 calendar days from the date of the decision being appealed as required by §ILHR 47.53(l)(b) of the Wisconsin Administrative Code.

Section ILHR 47.53(l) of the Wisconsin Administrative Code provides, in relevant part, as follows:

(b) Appeal requirements. All appeals pursuant to this chapter shall be filed no later than 30 calendar days from the date of the decision being appealed.

The appellant contended that its appeal was timely "filed" because it was mailed within 30 days of the date of the department's decision. This contention cannot be sustained. Section ILHR 47.53(l)(b) of the Wisconsin Administrative Code sets forth the rule that must be applied with regard to the limitation of appeal rights. In interpreting similar statutes and rules, the courts have held that the filing of an appeal is not completed upon mailing, but only upon receipt. See, First Wis. Nat. Bank of Madison v. Nicholaou, 87 Wis. 2d 360 (1979). Moreover, the notice attached to the department's decision stated, in relevant part, as follows: "A request for a hearing will be denied if the appeal is RECEIVED by the department more than 30 calendar days after the DATE OF THE DECISION..." Under the circumstances, the appellant's appeal was filed on the 32 nd day, the day it was received by the department.

State agencies are limited to the express authority conferred by statute and rule, and do not possess implied powers unless such powers are necessary to carry out tile express powers. State of Wisconsin (Dept of Admin.) v. DILHR, 77 Wis. 2d 126 (1977). Here, the administrative rule only confers authority for the department to hear appeals filed within 30 days of a decision under the PECFA program. The administrative rule contains no good cause or other exception to that standard. If the department had intended for appeals to be considered filed upon mailing, it could have written the rule to state that a timely appeal includes those postmarked within 30 days of the decision being appealed.

In this case, the appeal was not timely filed. Therefore, the department's motion to dismiss the appeal as untimely must be granted.